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Supreme Court, U.S.
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No. 93-1882

In the
Supreme Court of the United States
October Term, 1993

NORMAN W. SWANSON, *et al.*,
Class A Petitioners,

and

CHARLES L. BERRY, *et al.*,
Class B Petitioners,

v.

THE STATE OF NORTH CAROLINA, *et al.*,
Respondent.

Petition for A Writ of Certiorari To The
Supreme Court of North Carolina

SUPPLEMENTAL BRIEF IN OPPOSITION

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SUPPLEMENTAL BRIEF IN OPPOSITION

SUPPLEMENT TO ARGUMENT I (2) OF THE BRIEF IN OPPOSITION

On June 23, 1994, the Respondents submitted their brief in opposition to the petition for writ of *certiorari*. Included in the brief was a response to the argument that the North Carolina Supreme Court erred

by failing to give preclusive effect to a jurisdictional finding by United States District Court Judge Malcolm J. Howard in 1990 that North Carolina's tax refund statute for recovery of unlawful taxes, N.C. GEN. STAT. § 105-267, was not plain, speedy and efficient for purposes of the Tax Injunction Act.[1] Petitioners contended that the jurisdictional finding should have been given preclusive effect on the issue of whether N.C. GEN. STAT. § 105-267 violated their due process rights. Judge Howard expressly rejected this argument in his May 1994 order granting summary judgment to the Respondents in Petitioners' federal litigation.[2] Petitioners moved for reconsideration.[3] The motion was pending when the brief in opposition was filed.

On June 28, 1994, Judge Howard denied the Petitioners' motion for reconsideration. A copy of his order is set forth in the appendix to this supplemental brief. Of particular significance is Judge Howard's

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[1] *Brief in Opposition*, Argument I (2) at 23-24 in response to *Petition for Writ of Certiorari*, Argument 2 at 22-25.

[2] The text of that portion of Judge Howard's May 1994 order in *Swanson, et al. v. Faulkner*, EDNC No. 89-282-CIV-5-H (formerly *Swanson v. Powers*) is set forth in *Petitioners' Appendix H* at A82-A86.

[3] *See* footnote 15 on page 9 of the Petition for reference to Petitioners' motion for reconsideration.

decision as to the preclusive effect he ascribes to the jurisdictional finding he made in his 1990 order:

> The North Carolina Supreme Court has already decided that N.C. GEN. STAT. § 105-267 gives plaintiffs due process, both on its face and as applied . . . Plaintiffs, however, contend that this court's findings that § 105-267 is not plain, speedy and efficient was a finding that the statute violates the due process clause. *The court declines to adopt plaintiffs' reasoning.* The due process clause and the Tax Injunction Act are different devices with different standards. *Even if they were not, and this court had unwittingly held that § 105-267 violated the due process clause, this court's decision was non-final.* Plaintiffs recognized this fact when they moved for entry of final judgment. . . .

Judge Howard's June 28, 1994 Order, at 2, Appendix at 2a. (Emphasis added.) Thus, Petitioners' argument has been definitively rejected by the very judge who made the finding they contend should be given preclusive effect. It should likewise be rejected by this Court.

CONCLUSION

Respondents reiterate that the petition for writ of *Certiorari* should be denied.

Respectfully submitted,

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July 19, 1994

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

NO. 89-282-CIV-5-H

NORMAN W. SWANSON, et al.,	)	
	)	
Class A Plaintiffs,	)	
	)	
CHARLES L. BERRY, et al.,	)	
	)	**ORDER**
Class B Plaintiffs,	)	[Filed: June 28, 1994]
	)	
v.	)	
	)	
JANICE H. FAULKNER, et al.,	)	
	)	
Defendants.	)	

This matter is before the court on plaintiffs' motion for reconsideration. In an order filed May 6, 1994, this court granted defendants' motion for summary judgment and entered final judgment in favor of the defendants. Defendants have filed a memorandum in opposition to plaintiff's motion, and this matter is ripe for disposition.

Plaintiffs move for reconsideration on three grounds: that they need not satisfy state procedural law in order to maintain a suit in federal court for the deprivation of a federal right pursuant to 42 U.S.C. § 1983; that this court has already held that the state statute did not satisfy due process; and that this court has the authority to require the creation of a nondiscriminatory taxing scheme.

The remedies for the collection of an unconstitutional tax are prospective injunctive relief, a pre- or post-deprivation remedy that satisfies the requirements of the due process clause, and meaningful backward-looking relief. McKesson v. Div. of Alcoholic Beverages & Tobacco, 110 S.Ct. 2238 (1990). Accordingly, the state post-deprivation remedy, N.C. Gen. Stat. § 105-267, is not an administrative remedy or hurdle. It is, in fact, an integral part of the remedy to which plaintiffs are entitled. Federal law requires that when a tax is collected, there be a pre- or post-deprivation remedy for the tax that satisfies the due process clause. In other words, the state law which plaintiffs claim is an administrative requirement is, in fact, part of the remedy afforded to them by the federal constitution.

The North Carolina Supreme Court has already decided that N.C. Gen. Stat. § 105-267 gives plaintiffs due process, both on its face and as applied. This court is bound by that determination. Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1986). Plaintiffs, however, contend that this court's finding that § 105-267 is not plain, speedy and efficient was a finding that the statute violates the due process clause. The court declines to adopt plaintiffs' reasoning. The due process clause and the Tax Injunction Act are different devices with different standards. Even if they were not, and this court had unwittingly held that § 105-267 violated the due process clause, this court's decision was non-final. Plaintiffs recognized this fact when they moved for the entry of final judgment. The state court judgment was, however, final, and therefore binding on this court.

Finally, plaintiffs argue that the court has full authority to create in hindsight a nondiscriminatory taxing scheme. The meaningful backward-looking relief discussed in McKesson was a monetary refund. The Eleventh Amend-

ment bars suits for money damages, including refunds, against a state in a federal district court. Edelman v. Jordan, 415 U.S. 651 (1974). Consequently, plaintiffs request declaratory and injunctive relief in their motion for reconsideration. However, the allegedly unconstitutional taxing scheme has been repealed. There is no longer any practice to enjoin in this matter. Plaintiffs have received all the remedy a federal court exercising original jurisdiction is able to give to them.

For the foregoing reason, plaintiffs' motion for reconsideration is DENIED.

This the 27th day of June, 1994.

/s/ Malcolm J. Howard
MALCOLM J. HOWARD
United States District Judge

I certify the foregoing to be a true and correct copy of the original. David W. Daniel, Clerk United States District Court, Eastern District of North Carolina

/s/ Cherlyn Wells
Deputy Clerk

At Greenville, NC
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